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96-74

NO. _____

Supreme Court, U.S.
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In The
Supreme Court of The United States
October Term 1995

BLUE CROSS & BLUE SHIELD OF OHIO AND MUTUAL HEALTH SERVICES COMPANY,
Petitioners,

v.

CHAIM SCHACHNER, individually, and as representative of all similarly situated persons,
Respondent.

Petition For A Writ Of Certiorari To The United States Court of Appeals For The Sixth Circuit

PETITIONERS' REPLY BRIEF

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IN THE SUPREME COURT OF
THE UNITED STATES

CHAIM SCHACHNER	)	
	)	
Respondent	)	
	)	
vs.	)	
	)	
BLUE CROSS & BLUE	)	
SHIELD MUTUAL OF	)	Petition for Writ
OHIO AND MUTUAL	)	of Certiorari to
HEALTH SERVICES	)	the United States
COMPANY	)	Court of Appeals
	)	for the Sixth Circuit
Petitioners	)	

PETITIONERS' REPLY BRIEF

In an attempt to assert that no conflict exists among the circuits, Respondent Schachner ("Schachner") misrepresents the holding of the Court of Appeals below and misrepresents the background facts and purpose for which both parties submitted extrinsic evidence to the District Court. The apparent necessity for Schachner to make such transparent revisions emphasizes that there is no real dispute as to the conflict among the circuits created by

the Opinion below, and that plenary review is both appropriate and necessary.

A. SCHACHNER'S MISREPRESENTATIONS AS TO THE HOLDING OF THE COURT OF APPEALS

Schachner's Brief rests entirely upon the following misstatement of the Court of Appeals' holding:

> "As demonstrated below, and found by the Sixth Circuit; Cardiac Rehab services squarely fit the definition of 'Treatment by Physical Means'" (Schachner Brief at 2, emphasis added).

Quite to the contrary, however, the Court of Appeals held that:

> "There may be an issue of fact remaining as to whether Schachner's cardiac rehab sessions fit within the unambiguous definition of 'Treatment by Physical Means'". Apdx. A-14
>
> . . . .
>
> "BCBSO may wish to present evidence indicating that the sessions Schachner underwent do not fit within the certificate's definition of "Treatment by Physical Means", and we will remand the case for further proceedings on this issue." (Apdx. A-14, emphasis added)

Schachner's misrepresentation attempts to sidestep the actual holding of the Court of Appeals that it was only the meaning of the phrase "Treatment by Physical Means" as

defined on the face of the Certificate that was unambiguous. (Apdx. A-13)

The Court of Appeals acted in the mistaken belief that a requirement of finding ambiguity means that a court should only look exclusively at the face of a Plan Certificate to determine if words are ambiguous. It is this holding that is in conflict with this Court's decision in Firestone Tire & Rubber Co. v. Bruch, 489 U.S. 101 (1989) and the other courts of appeal, as set forth in our main Brief.[1]

This Court and the other circuits noted in our main Brief permit an ERISA court to consider extrinsic evidence in addition to the text of the Plan Certificate because reliance solely upon words that may not appear to be ambiguous on their face can easily lead to a conclusion that was never intended by the parties. Instead of the mechanical "four corners" approach adopted by the Court of Appeals below, this Court and those circuits recognize that words found in a Plan Certificate may be used in a variety of contexts and that their true meaning, and the true intent of the parties, can only be found by examining all of the

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[1] The Court's approach not only conflicts with the other circuits, as well as this Court, it begs the question since it left unresolved the very question presented, viz. does Cardiac Rehab fall within the definition of "Treatment by Physical Means". The Court's error can be traced to its misplaced use of the term "ambiguous on its face". See complete discussion of the confusion caused by this term in Mellon Bank N.A. v. Aetna Business Credit, 619 F. 2d 1001, 1012 n. 13 (3rd Cir. 1980).

manifestations of the parties' intent in addition to examining the text of the Plan.

Schachner's misstatement of the Court's holding requires that his entire brief be disregarded because the maneuver is the sole support for all of his contentions. Schachner's assertions, (a) that Blue Cross' interpretation is "contrary to the express Plan language", and therefore, not a "plausible interpretation" (Schachner Brief 6, 8, 10); (b) that the language used, on the face, is susceptible to only one interpretation (Id.) and (c) that "No circuit allows consideration of extrinsic evidence to vary the terms of document with neither a 'latent' nor 'patent' ambiguity (Schachner Brief at 6), all rest upon the same misrepresentation of the opinion below.

Of the numerous misstatements contained in Schachner's Brief, his assertion that "the Sixth Circuit did not reject the concept of latent ambiguity" - it simply found the concept inapplicable to the facts of the case," (Schachner Brief at 10) merits special mention. That misrepresentation is based upon the curious contention that "even latent ambiguities must appear on the face of the document" and that "the wording of this plan was so clear that there was no room for a latent ambiguity." (Schachner Brief at 10-11)

The Court of Appeals made no finding that the wording of the plan was so clear that there was no room for a latent ambiguity. Indeed, as shown above, the Court found that there was an issue of fact as to what the

definition of "Treatment by Physical Means" means. (Apdx. A-14)

Furthermore, it should be indisputable that a latent ambiguity, by definition, cannot appear on the face of a document. A latent ambiguity occurs when an agreement seems clear on its face but is unclear when viewed in connection with background facts that show that its facial meaning is not its true meaning. See AM Int'l, Inc. v. Graphic Management, Inc. 44 F. 3d 572, 574-7 (7th Cir. 1995); Matter of Stoecker, 5 F. 3d 1022, 1029-30 (7th Cir. 1993); Federal Deposit Ins. Corp. v. W. R. Grace & Co., 877 F. 2d 614, 620-21 (7th Cir. 1989).[2]

In the First, Third, Seventh, Eighth and Ninth Circuits, Blue Cross' claim that the intent of the parties to the ERISA plan document could not be resolved without a consideration of all extrinsic evidence would have resulted in a review of extrinsic evidence in order to make certain that the ERISA court was not imposing its own judgment of what the language means in place of the parties' intent. (See Main brief at 13-17). It is likely that in these circuits the Order of the District Court, finding the parties did not intend the services to be included, would be affirmed.

In the Sixth Circuit, however, such a claim of ambiguity would now be dismissed and the intent of the

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[2] Here, the extrinsic evidence presented by both parties demonstrated the ambiguity, implicitly admitted by the Court of Appeals in its holding that an issue of fact remains as to what the definition of treatment by Physical Means" means.

parties disregarded unless, in the Court's opinion unaided by extrinsic evidence, there was some "patent ambiguity" within the "four corners" of the plan certificate. As a result of the opinion below, an interpretation of an ERISA regulated plan that directly contradicts the real intent of the parties can be easily arrived at by a District Court.

It is this clear conflict among the circuits that must be resolved in order to comply with the intent of Congress that ERISA law be uniform throughout the country. (See Main Brief at 23-24)

B. SCHACHNER'S MISREPRESENTATIONS AS TO THE EXTRINSIC EVIDENCE INVOLVED AND THE PURPOSE FOR WHICH IT WAS SUBMITTED TO THE DISTRICT COURT

In Schachner's restatement of his "Questions Presented for Review", Schachner assumes as a fact that Blue Cross submitted extrinsic evidence to the District Court in order to "create an ambiguity in an otherwise unambiguous plan document" (Schachner Brief at (i)).

Quite to the contrary, Blue Cross never submitted any extrinsic evidence prior to the initial holding of the District Court that the language of the Certificate was ambiguous. The District Court's initial holding was sua sponte, and never briefed or argued. (See Opinion of Court of Appeals at A 9-11; and Petition for Rehearing, Apdx. G-88 at G-95 - G-102). The evidence of both parties was submitted after the District Court's sua sponte ruling

for the purpose of resolving the ambiguity previously found by the District Court not to "create an ambiguity". (Id.)

Significantly, however, Schachner's recounting of the evidence that he submitted to resolve that ambiguity omits evidence that is directly relevant to the intent of both parties as to whether or not Cardiac Rehab was included in the language "Treatment by Physical Means". For example, Schachner's reference to the affidavit of Benjamin Meola, the Program Supervisor for the Cardiac Rehabilitation Program at Mt. Sinai Medical Center where Schachner underwent his Cardiac Rehab sessions (Schachner Brief at 3) omits Meola's sworn statement that:

> "14. To the best of my knowledge Blue Cross & Blue Shield Mutual of Ohio does not pay for cardiac rehabilitation sessions, though I do not know why.
>
> 15. There have been many patients of the Mt. Sinai Medical Center, insureds of Blue Cross & Blue Shield Mutual of Ohio, who have not undergone cardiac rehabilitation services because Blue Cross & Blue Shield Mutual of Ohio has denied coverage for them." (Apdx. K-120)

Despite this evidence that Schachner himself submitted to the District Court, Schachner contends now that "This case is a wholly inappropriate vehicle for addressing the issue of proper extrinsic evidence" and that "There was no extrinsic evidence available to ascertain the parties' mutual intent as to the meaning of the language in question." (Schachner Brief at 17-19).

Is it not proper for a court to consider evidence that one party to a contract had a practice of consistently denying coverage for a service that is contended by a beneficiary of the other party to be covered unambiguously by that policy?

And is it not proper for a court to consider whether that beneficiary had an opportunity to learn of that practice of the first party from his Hospital Program Supervisor before he underwent that service?

In this regard, Schachner testified: (1) that he did not look at his insurance policy with Blue Cross before undergoing Cardiac Rehab; (2) that he talked to Benjamin Meola, his Program Supervisor for Cardiac Rehab, as to whether Cardiac Rehab would be covered by insurance; (3) that Mr. Meola told him that "most of the time it's covered by insurance"; but (4) that he "doesn't remember" whether Meola was referring to other insurance companies, or Blue Cross. (Apdx. M-128 - M-129)

Is not this evidence relevant to whether Blue Cross' practice of generally not covering Cardiac Rehab, admittedly known to Meola, Schachner's Program Supervisor, was known, or should have been known, by Schachner before he underwent Cardiac Rehab sessions?

If so, should not this evidence of Schachner's acquiescence in Blue Cross' practice of not covering Cardiac Rehab services be given great weight in the interpretation of the Plan Certificate?

This Court in Firestone Tire & Rubber Co. v. Bruch, 489 U.S. 101, 113 (1989) laid down the following standards for the interpretation of ERISA plan documents under both trust and contract law:

> "The terms of trusts created by written instruments are "determined by the provisions of the instrument as interpreted in light of all the circumstances and such other evidence of the intention of the settlor with respect to the trust as is not inadmissible." Restatement (Second) of Trusts §4, Cmt. *d* (1959).
>
> The trust law *de novo* standard of review is consistent with the judicial interpretation of employee benefit plans prior to the enactment of ERISA. Actions challenging an employer's denial of benefits before the enactment of ERISA were governed by principles of contract law. If the plan did not give the employer or administrator discretionary or final authority to construe uncertain terms, the court reviewed the employee's claim as it would have any other contract claim - by looking to the terms of the plan and other manifestations of the parties' intent. (Citations omitted, emphasis added)

The Courts of Appeal for the Third and Eighth Circuits have expressly held that this holding in Firestone authorizes ERISA courts to look to "other manifestations of the parties' intent" as well as the terms of the plan itself in interpreting ERISA plans. Heasley v. Belden & Blake Corp., 2 F. 3d 1249, 1255 n. 5 (3d Cir. 1993); Finley v.

Special Agents Mut. Benefit Ass'n., Inc., 957 F. 2d 617, 620 (8th Cir. 1992).

There can be no dispute that the extrinsic evidence relied upon by the District Court below, but disregarded by the Court of Appeals, constitutes "manifestations of the parties' intent" as referred to by this Court in Firestone.

Schachner's inability to face the clear conflicts here without distorting the opinion of the Court of Appeals and the extrinsic evidence emphasizes and reinforces the inevitable conclusion that plenary review is necessary here. Indeed, Blue Cross suggests that summary reversal is now in order.

Respectfully submitted,

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